



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC No. 75 OF 2019

(FORMERLY HCCC No. 26 OF 1992)

NDEFFO CO. LIMITEDPLAINTIFF

VERSUS

JOHN WACHIRA KAMAU and LUCY WANGARI KAMAU

(sued as administrators of the Estate of

FLORENCE NYAMBURA)1ST DEFENDANT

M.H. SHAW

(administrator of the estate of the late J.T. OBERHOLZER)2ND DEFENDANT

NANCY WAIRIMU and BERNARD GATHIRA KARENJU

(sued as administrators of PAUL KARENJU WAMBUGU)3RD DEFENDANT

SARAH NYAMBURA KARENJU4TH DEFENDANT

CATHERINE WAMBUI KARENJU5TH DEFENDANT

JUDGMENT

1. Proceedings in this matter commenced through plaint filed on 20th January 1992, in the High Court. The matter remained in that court until 9th May 2013 when it was first listed before a judge of this court. It was later allocated a case number of this court in the year 2019.
2. The plaint underwent several amendments resting with “Further Further Amended Plaint” filed on 13th October 2016. The plaintiff described itself therein as a company incorporated solely for the purpose of buying and selling land to its members. It averred that in 1969, its members took possession and use of parcels of land known as LR No. 449 and 6501 (hereinafter “the suit properties”) belonging to the late J.T. Oberholzer. In July 1980, the late Oberholzer filed Nairobi HCC Case No. 1933 of 1980 against the plaintiff seeking repossession of the suit properties and judgement was issued in his favour. In July 1981, the plaintiff offered to purchase the suit land for its members and on 18th November 1985 after negotiations, they agreed that the plaintiff would purchase the suit properties for a consideration of KShs 95,000 plus mesne profits of KShs 240,000. The mesne profits were later waived. That it paid the total purchase price to the 2nd defendant in June 1987 and obtained relevant documents for transfer.
3. The plaintiff further averred that in October 1980 a letter was forwarded to it indicating that the 1st defendant was also claiming to have purchased the suit properties and in August 1987 the 1st defendant in collusion with the 2nd defendant obtained consent of the Land Control Board and fraudulently transferred the suit properties to the 1st defendant. That on or about 19th February 1997 during the pendency of this suit the 1st defendant unlawfully sold LR No. 6501 to the 3rd defendant who later unlawfully transferred it to the 4th and 5th defendants.
4. The plaintiff therefore prayed for judgement against the defendants jointly and severally for:

a) A Declaration that the Plaintiff is the legal purchaser of LR No. 449 and 6501, Nakuru previously owned by the late J.T. Oberholzer.

(aa) A declaration that the sale of LR No. 6501 to the 3rd Defendant by the 1st Defendant during the pendency of this suit was null and void and the transfer to the 4th & 5th Defendants by transmission is of no legal effect and the said transfer be revoked and or set aside forthwith.

b) A declaration that the Land Control Board Consent of August, 1987 and subsequent transfer of the L.R. Nos. 449 and 6501 to the 1st Defendant Florence Nyambura by the 2nd Defendant was null and void in law and the same be declared cancelled for all practical purpose and effect.

c) Eviction Orders.

d) Vacant possession

e) A permanent injunction to issue against the Defendants jointly and severally by themselves, their agents and/or servants restraining them from entering, cultivating, remaining or in any way interfering with the suit premises.

f) Mesne profit

g) Costs of the suit

h) Any other or further relief as this Honourable court may deem fit and just to grant.

5. The 1st defendant filed Amended Statement of Defence dated 2nd June 2017 in which they averred that Florence Nyambura (deceased) was the legal owner of the suit properties having bought them from the late J.T. Oberholzer (deceased) in 1969. They added that the late J.T. Oberholzer filed HCC Case No. 774 of 1971 against the plaintiff and that the suit was compromised on condition that the plaintiff buys the land for over KShs 1,000,000 which sum the plaintiff has not paid. They further averred that due to the failure by the plaintiff to pay the purchase price J.T. Oberholzer (deceased) entered into a sale agreement in relation to the properties with Florence Nyambura (deceased) who later lawfully disposed of the properties during her lifetime. They denied all the other allegations in the Further Further Amended Plaintiff and urged the court to dismiss the suit with costs.

6. The 2nd defendant neither filed defence nor participated in the proceedings.

7. The 3rd, 4th and 5th defendants filed a joint statement of defence in which they averred that on 19th February 1997 Florence Nyambura (deceased) lawfully sold LR 6501 to the late Paul Wambugu Karenju who was an innocent purchaser for valuable consideration. They denied all the other allegations in the Further Further Amended Plaintiff and also urged the court to dismiss the suit with costs.

8. At the hearing, Charles Anderson Ndungu Mbugua testified as the plaintiff's sole witness. He described himself as a shareholder of the plaintiff since the year 1968 and stated that the suit properties were bought by the plaintiff from the late J.T. Oberholzer in 1969 and that they occupied the plots in the same year. He added that LR No. 449 was measuring 10 acres while LR No. 6501 was measuring 5 Acres. That the late J.T. Oberholzer sued the plaintiff in Nairobi HCC No. 1933 of 1980 and won the case with the court ordering the plaintiff herein to give possession of the suit properties. That the plaintiff they did not move out but started to negotiate with the late J.T. Oberholzer in 1980 and that he passed away on 11th July 1982 before conclusion of the negotiations.

9. He added that the 2nd defendant became the administrator of the estate of the late J.T. Oberholzer and that eventually negotiations resulted in an agreement that the plaintiff pays KShs 95,000 for the two plots. That the plaintiff paid the said amount in 1986 to the estate of the late J.T. Oberholzer through Daly & Figgis Advocates who were representing the late J.T. Oberholzer in Nairobi HCC No. 1933 of 1980. He further testified that the plaintiff was then given transfer, consent and grant of letters of administration but not the originals of the title deeds. That later through a letter dated 1st October 1986 the 2nd defendant claimed that the late J.T. Oberholzer had sold the suit properties to Florence Nyambura (deceased) who had deposited KShs 20,000 towards the purchase with Mindo & Co. Advocates who were her lawyers.

10. He further testified that the 2nd defendant proposed to refund the plaintiff's money but the plaintiff refused and that the 2nd defendant later caused the suit property to be transferred to himself and later to Florence Nyambura on 4th April 1990 and that the 2nd defendant also transferred LR No. 6501 to Paul Karenju Wambugu. He added that LR No. 449 remained in Florence Nyambura's name and that the transfers were done during the subsistence of this suit.

11. The plaintiff's case was then closed.

12. The 1st defendant closed their case without offering any evidence.

13. Nancy Wairimu Karenju testified next as the sole witness in respect of the 3rd to 5th defendants' case. She stated that the late Paul Karenju Wambugu who was her father passed away on 9th November 2002 and that her and her brother Benard Gathira Karenju obtained confirmed grant in respect of his estate. She testified further that LR 6501 measures about five acres, that it was part of her late father's estate and that it was distributed to the 4th and 5th defendants. She also testified that her late father bought the said property for KShs 400,000 from Florence Nyambura through sale agreement dated 19th February 1997. She added that there was a further sale agreement dated 19th February 1997 in respect of the developments on the land including the main house. She also testified that the property was charged in favour of ICDC by Florence Nyambura as at the date of purchase by her late father, that her father settled the loan that owed to ICDC and that title was later issued to him on 27th September 2012. She added that her father took possession of the land and used it until he passed away.

14. The 3rd, 4th and 5th defendants' case was then closed.

15. Parties then filed and exchanged written submissions. The plaintiff submitted that the dispute in Nairobi HCC No. 1933 of 1980 as well as the decree of the court in that case shows that the late J.T. Oberholzer was the original registered owner of the suit properties and that the members of the plaintiff occupied the said parcels thus leading to the suit. The plaintiff submitted further that the suit was settled by the plaintiff herein paying KShs 95,000 on 5th June 1987 as purchase price of the two plots. The plaintiff also submitted that the late Florence Nyambura was not in occupation of the suit properties as otherwise she would have also been sued in Nairobi HCC No. 1983 of 1980. The plaintiff relied on **Sections 107 and 108 of the Evidence Act** and argued that the 1st and 2nd defendants did not offer any evidence to demonstrate how the late Florence Nyambura obtained title.

16. On whether the late Paul Karenju Wambugu obtained LR No. 6501 lawfully, the plaintiff relied on **Katende vs Haridar & Company Limited [2008] 2 E.A.173** and submitted that the 1st defendant did not produce any documents to show how the property was transferred to the late Paul Karenju Wambugu and whether she had a valid title to the suit property considering that the present suit which challenges her title had already been filed against her as at the date of the transfer. The plaintiff also contended that the late Paul Karenju Wambugu was not an innocent purchaser for value as the transaction between him and the late Florence Nyambura was intended to defraud and prejudice the plaintiff.

17. Additionally, the plaintiff argued that LR No. 6501 was registered under the Government Lands Act and that the sale on 19th February 1997 to the late Paul Karenju Wambugu was contrary to the doctrine of *lis pendens* as provided at **Section 52 of the Indian Transfer of Property Act** (now repealed). In that regard, the plaintiff relied *inter alia* on the cases of **Olympic Company Trading Ltd & another v Said Mohamed & 4 others [2014] eKLR** and **Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR**. The plaintiff therefore urged the court to grant it the reliefs sought in the further further amended plaint together with costs.

18. The 1st defendant conceded in their submissions that the plaintiff and its members were in occupation of the suit properties thereby leading to the filing of Nairobi HCC No. 1933 of 1980 and the decree issued therein which required the plaintiff herein to deliver possession thereof to the late J.T. Oberholzer. They argued that the letter from Daly & Figgis dated 16th June 1987 which the plaintiff has relied on to show payment of purchase price of the suit properties is not admissible since it is a without prejudice correspondence. They cited **Section 23(1) of the Evidence Act** and the case of **Charles Davy Kipng'etich Arap Kirui v Wangethi Mwangi & Another [2007] eKLR**.

19. On whether the plaintiff discharged the burden of proof regarding its allegations of fraud, the 1st defendant cited **Section 26 (1) (a) of the Land Registration Act** and the case of **Koinange & 13 others v Charles Karuga Koinange [1986] eKLR** and submitted that the plaintiff has failed to discharge the burden and is therefore not entitled to the orders sought.

20. On their part, the 3rd, 4th and 5th defendants submitted that the plaintiff's suit is incompetent since despite the plaintiff being a limited liability company no resolution or authority of its board was availed. Reliance was placed on the case of **Kenya Commercial Bank Limited v Stage Coach Management Ltd [2014] eKLR**. They further argued that there is evidence on record that the plaintiff's payment of KShs 95,000 was accepted on a without prejudice basis and that it was in fact to be refunded since the late Florence Nyambura had purchased the suit properties from the late J.T. Oberholzer prior to the plaintiff's said payment. They added that the late J.T. Oberholzer passed away in 1982 and that there was no agreement between the plaintiff and the late J.T. Oberholzer for the purchase of the suit properties. They thus argued that the plaintiff had both failed to prove purchase of the suit properties and to discharge the burden of proof of fraud. They relied on the case of **Tabitha Wanjiru Kinyanjui & another v Stephen Kinyanjui Mburu [2020] eKLR**.

21. Regarding whether the purchase of LR 6501 by the late Paul Karenju and its subsequent transfer to the 4th and 5th defendant was null and void by dint of the doctrine of *lis pendens*, the 3rd, 4th and 5th defendants submitted that the late Paul Karenju had purchased the property from the late Florence Nyambura who was the then registered owner on 19th February 1997 yet the plaintiff did not join him to the suit until he passed away in the year 2002. That the suit was dormant for a long time and that *lis pendens* is not applicable since **Section 52 of the Indian Transfer of Property Act** (now repealed) refers to "*during active prosecution ...*" of a case. They relied on the case of **Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR** where the Court of Appeal stated:

54. On whether the doctrine can be interpreted to mean that the filing of proceedings serves as an automatic stay of the sale; we are of the view that it cannot. As stated under the repealed Section 52 of the ITPA, an automatic prohibition of dealings or transfers of the property is only during the 'active prosecution' of the proceedings.

55. This conclusion is informed by the fact that lis pendens as applied in Kenya is heavily borrowed from the Indian system. ... In Kenya, however, no such measures have been legislated regarding lis pendens. As such, the practical approach remains that mere institution of suit does not trigger the doctrine. Rather, it is upon the active prosecution of that suit that the doctrine automatically sets in. Consequently, the contention that mere filing of suit operates as an automatic stay of dealings, fails.

22. The 3rd, 4th and 5th defendants therefore submitted that the late Paul Karenju Wambugu was an innocent purchaser for value and urged the court to dismiss the suit.

23. I have carefully considered the parties' pleadings, evidence and submissions. Three issues arise for determination are whether the plaintiff purchased the suit properties, whether the transfer of the suit properties to the late Florence Nyambura and to the other defendants was fraudulent and lastly whether the reliefs sought are available.

24. There is no dispute that the plaintiff herein and the late J.T. Oberholzer were involved in litigation in Nairobi HCCC No. 1933 of 1980 and that a partial decree was issued in the said matter on 11th May 1981 to the effect that the plaintiff herein delivers possession of LR No. 449 and 6501 (the suit properties herein) to the late J.T. Oberholzer. Parties herein are in agreement that the suit properties were originally owned by the late J.T. Oberholzer and hence the litigation in Nairobi HCCC No. 1933 of 1980.

25. It seems that J.T. Oberholzer passed away some time after the decree. The plaintiff's witness testified that he passed away on 11th July 1982. No certificate of death or other documentary proof of death was however availed by the plaintiff. Nevertheless, the plaintiff emphatically pleaded at paragraphs 3 of both the original plaint filed on 20th January 1992 as well as the further further amended plaint that the 2nd defendant "is sued in his capacity as one of the two administrators of the estate of the late J.T. Oberholzer". The suggestion once again is that J.T. Oberholzer had passed away as at institution of this suit. Nevertheless, the plaintiff has availed no material to demonstrate that the 2nd defendant was appointed an administrator of the estate of the late J.T. Oberholzer. Equally, it has not been explained why only one administrator was sued if indeed there were two administrators.

26. The plaintiff contends that the decree in Nairobi HCCC No. 1933 of 1980 notwithstanding, it entered into negotiations with J.T. Oberholzer for it to purchase the suit properties and that the negotiations were successfully concluded after J.T. Oberholzer's death. From the material placed before the court by the plaintiff, I note that there is a letter dated 23rd July 1981 from Hamilton Harrison & Mathews Advocates to Mirugi Kariuki & Co Advocates which reads as follows:

H.C.C.C. No. 1933 of 1980

J.T. Oberholzer vs. Ndefo Limited

We have been instructed by Mr. Oberholzer to as you to make an offer for the two plots, which we will then consider.

27. It seems that Hamilton Harrison & Mathews Advocates were then representing J.T. Oberholzer while Mirugi Kariuki & Co Advocates were representing the plaintiff herein. After the letter dated 23rd July 1981 there followed some back and forth in correspondence. The parties appear to have agreed to carry out a valuation of the suit properties. A valuation was done which put the value of the suit properties at a combined sum of KShs 95,000. That much is confirmed by Hamilton Harrison & Mathews Advocates' letter to Mirugi Kariuki & Co Advocates dated 18th November 1985 and the latter's letter in response dated 4th July 1986. Further, by Hamilton Harrison & Mathews Advocates' letter dated 11th August 1986 to Mirugi Kariuki & Co Advocates which was headed "Subject to Contract" it was made clear that the plaintiff's offer to purchase the suit properties at KShs 95,000 would be accepted subject to the said amount being paid to Hamilton Harrison & Mathews Advocates on their undertaking not to release it to the vendor.

28. The plaintiff contends that it paid the sum of KShs 95,000 to the estate of the late J.T. Oberholzer through Daly & Figgis Advocates who the plaintiff's witness testified was representing the late J.T. Oberholzer in Nairobi HCC No. 1933 of 1980. I note that the plaintiff produced a receipt for KShs 95,000 issued on 15th June 1987 by Daly & Figgis Advocates. It is not clear how Daly & Figgis Advocates came into the matter and how the sum was paid to them instead of Hamilton Harrison & Mathews Advocates who had done the negotiations and who had given the undertaking. I note however that the letters from Daly & Figgis Advocates were generally signed by the 2nd defendant herein who the plaintiff claims is an administrator of the estate of the late J.T. Oberholzer.

29. The question that ultimately arises is: did the plaintiff ultimately enter into an agreement to purchase the suit properties as was contemplated in Hamilton Harrison & Mathews Advocates' letter dated 11th August 1986? I am afraid the plaintiff has not persuaded me that such a contract exists. To begin with, it has not been demonstrated that the 2nd defendant herein is an administrator of the estate of the late J.T. Oberholzer so as to place him in a position to validly deal with the deceased's property. That detail is important since it is the plaintiff's case that the negotiations were successfully concluded after J.T. Oberholzer had passed away. If that be the case, the plaintiff could only validly transact with the administrators of the estate. Even then, the plaintiff would need to demonstrate that it transacted with all the administrators.

30. I have anxiously perused the exhibits that plaintiff produced. The closest to an agreement to purchase the suit properties that one gets is the indenture in respect of LR No. 449 at pages 29 and 30 of the plaintiff's list of documents filed on 8th October 2018. Save for specifying the year 1980, the document does not mention the day and month it was executed. Further, the document claims to have been made "between Neville Patrick Gibson Warren and Michael Hasluck Shaw the administrators of the estate of Johannes Theodorus Oberholzer – deceased ... and Ndefo Limited...". Needless to restate, the plaintiff asserts in this case that J.T. Oberholzer passed away on 11th July 1982. Among its exhibits is a letter dated 5th August 1988 from Daly & Figgis Advocates in which the date of death is stated to be 11th July 1982. One is therefore left wondering how there would have been administrators in respect of the estate of a person who was alive and kicking.

31. Regarding LR No. 6501, the plaintiff did not produce any indenture or sale agreement. The plaintiff's witness conceded as much. Whereas the plaintiff has shown that there were some negotiations and payment for the suit properties, I am not satisfied that the negotiations were successfully concluded either with J.T. Oberholzer or any valid administrators of his estate. I am equally not able to ascertain if the payment of KShs 95,000 was made to the estate of J.T. Oberholzer. In sum, I am not persuaded that the plaintiff purchased the suit properties.

32. The plaintiff has claimed that the transfer of the suit properties to the late Florence Nyambura and the transfer of LR No. 6501 to the 4th and 5th defendants were all fraudulent.

33. A litigant who approaches the court on allegations of fraud makes a bold move and assumes a gargantuan task. Beyond making allegations, he must strictly prove them. See **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR**. The burden of proof facing a party alleging fraud is higher than proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See **John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR**. Further, fraud cannot simply be inferred from the facts.

34. The Court of Appeal recently reiterated the law in regard to proof of fraud in **Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia [2020] eKLR** where it stated:

It is a principle of the law that the party who alleges must prove. The appellants alleged that the transfer of the suit land from the deceased all the way to respondent was fraudulent. Did the appellant prove to the required standard the allegations of fraud against Janet, Joseph and the respondent? In the case of Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another [1979] eKLR, this Court took the view that the onus to prove fraud in a matter is on the party who alleges it. Similarly, in cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR, Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” *Emphasis ours. ...*

... Fraud is a quasi-criminal charge which must, as already stated, not only be specifically pleaded but also proved on a standard though below beyond reasonable double doubt, but above balance of probabilities.

35. In regard to the transfer to the late Florence Nyambura, the plaintiff gave such particulars of fraud as “concealing ... the plaintiff’s interest on the suit property”. As we have already noted, the plaintiff has failed to demonstrate that it purchased the suit properties. That being so, the plaintiff had no interest in the suit properties that the defendants can be said to have concealed.

36. As regards transfer of LR No. 6501 to the 4th and 5th defendants, the plaintiff largely complains that the transfer was effected during pendency of this suit with a view to defeating its claim. It has sought to rely on the doctrine of *lis pendens*. Having failed to demonstrate that it purchased the suit properties, the plaintiff’s protests as to how the late Florence Nyambura transacted on LR No. 6501 are really neither here nor there. I am not persuaded that the transfer of the suit properties to the late Florence Nyambura and even the transfer of LR No. 6501 to the 4th and 5th defendants were fraudulent.

37. In view of my forgoing findings, it is axiomatic that the plaintiff’s case cannot succeed. I dismiss it with costs to the 1st, 3rd, 4th and 5th defendants. I do not award the 2nd defendant any costs since he did not participate in these proceedings.

Dated, signed and delivered at Nakuru this 3rd day of May 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Wangari holding brief for Mr Waiganjo for the plaintiff

Mr Kipkoech for the 1st defendant

No appearance for the 2nd defendant

Mr Ndubi for the 3rd to 5th defendants

Court Assistants: B. Jelimo & J. Lotkomoi